

**TOLLING THE STATUTE OF LIMITATIONS IN
TORT CASES FOR VICTIMS OF CRIME**

By Richard W. Hendrix

**Finch McCranie, LLP
225 Peachtree Street, N.E.
1700 South Tower
Atlanta, Georgia 30303
404/658-9070
www.finchmccranie.com**

www.whistleblowerlawyerblog.com

The purpose of this article is to acquaint the Plaintiff's bar with a very important but little known statute. The statute at issue, O.C.G.A. ' 9-3-99, was passed as part of the "Crime Victims Restitution Act of 2005." It became effective July 1, 2005 and reads as follows:

The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six (6) years.

Given that virtually every automobile accident involves misdemeanor criminal charges against a negligent driver (who presumably violated the Georgia Uniform Rules of the Road and was charged via a citation), it is submitted that in virtually every automobile accident tort case, this statute could potentially extend the statute of limitations from 2 years to 6 years. The same is true for any tort case (particularly intentional torts) resulting in criminal charges against a defendant. While the new statute has yet to be interpreted by any Georgia court, there are many interesting legal issues that may emerge in the future with respect to it.

Our firm first became aware of this statute in the context of two wrongful death

actions we were prosecuting on behalf of separate families in Canada. These two deaths had occurred in a very bad tractor-trailer accident. While preparing those cases for trial, we contacted another person who had been injured in the same accident. This particular person lived in the state of Florida. When we first contacted the individual about providing a deposition for our cases, two years had already passed since the accident occurred. The witness, nonetheless, asked if our firm could assist him in bringing claims against the trucking company responsible for the collision. Because of the passage of time and also because we had a conflict of interest representing a witness we needed to depose for our other clients, we declined. However, when we later settled the two wrongful death cases and advised the witness his deposition was no longer needed, he again asked if we could be of service to him. Even though the otherwise applicable two-year statute of limitations had arguably run, because the tractor-trailer driver had been charged with vehicular homicide in connection with the deaths in our other two cases and because our conflict no longer existed, we agreed to file claims on the new client's behalf and to assert in his case that the statute of limitations had been tolled since he was a "victim" of a crime which had been committed in this state.

As might be expected, as soon as we filed the lawsuit, defense counsel filed a Motion to Dismiss the Complaint on the grounds that the statute of limitations had allegedly expired. Relying on O.C.G.A. '9-3-99, in opposition, we filed an Affidavit executed by the State Trooper who investigated the collision in which the Trooper set forth his opinion that there were numerous "victims" involved in the collision including those killed and injured,

one of which was the Florida resident. Thus, we contended that an issue of fact remained and that the Court could not summarily adjudicate the case with respect to the statute of limitations defense. Both parties briefed the case, but before any official ruling was made, a settlement offer was tendered to our Florida client which he accepted.

One of the interesting features of the case which brought this new statute to our attention was the issue of vicarious liability. O.C.G.A. '9-3-99 specifically states that the running of the period of limitations “with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled. . .” We contended that not only was the statute of limitations tolled with respect to the at fault truck driver but also his employer who was vicariously responsible for his acts. This, of course, was important because we asserted claims against not only the driver but also his employer, an interstate motor carrier. Because the statute specifies that the period of limitations “with respect to any cause of action in tort” which “arises out of the facts and circumstances relating to the commission of such alleged crime” shall be tolled, we contended that the cause of action itself was tolled thus extending the statute of limitations not only for the at fault driver but also his employer, the interstate motor carrier.

Another interesting issue in our case which gave rise to this article is the question of whether the Florida client was actually “a victim” of a crime. The vehicular homicide charges which had been brought against the truck driver, obviously, pertained to the death of others. Because no specific criminal charge was brought relative to injuries sustained by

other individuals involved in the same accident, the defense contended that our Florida client did not technically meet the definition of a “victim” of an alleged crime since no crime had been alleged with respect to his injuries. We contended, of course, that even though the prosecutor made the decision to bring the most serious charges that could be brought against the driver, that it was absurd for the trucking company to argue that our Florida client was not a victim simply because he survived his injuries, whereas, the other victims, having been more seriously injured, died. Again, this issue was never addressed because a settlement was reached.

As might be imagined, absent this statute, there would have been no settlement of this case because of what otherwise would have been a solid statute of limitations defense. In many ways we were disappointed that we could not litigate the very interesting legal issues involved because obviously a favorable ruling for our client could have had a far reaching impact for all tort victims of crimes in the State of Georgia. Nonetheless, we believe that the language of the statute is sufficiently clear such that all victims of crimes in this State can take advantage of its provisions.

Given the existence of this statute, it is now important that counsel review every case closely where there is otherwise a potential statute of limitations issue. All plaintiffs’ counsel have been confronted with cases where clients have waited until the very last moment to contact an attorney. In the past, such cases may have been routinely refused, particularly in those cases where clients failed to contact counsel within two years. However, in cases where there otherwise appears to be legitimate injuries and legitimate

liability, counsel should now inquire whether the tortfeasor was charged with violations of the Uniform Rules of the Road or other criminal violations. If so, there is a very good argument to be made that O.C.G.A. ' 9-3-99 may have tolled the statute of limitations for such cases. Again, this is because any violation of the Uniform Rules of the Road set forth in O.C.G.A. ' 40-6-1, *et. seq.*, is by definition, a misdemeanor. See O.C.G.A. ' 40-6-1(a).

As is evident from our firm's experience, one of the interesting legal questions which will have to be resolved in a future case is whether a tort victim, not himself named as a victim of an alleged crime in any specific criminal charge, is nonetheless a "victim" entitled under the law to take advantage of its provisions. The definition of victim found at O.C.G.A. ' 17-4-2(9) is "any natural person . . . suffering damages caused by the offender's unlawful act." It is noteworthy that Georgia law does not define a victim as being a person specifically named as such in formal criminal charges. Rather, a victim is merely a natural person suffering damages caused by the unlawful act at issue. Given this expansive definition, we believe that we would have prevailed in the legal contest with the trucking company had the matter proceeded that far.

In our case involving the Florida client, the trucking company also asserted that we were attempting to utilize the statute in an unconstitutional ex post facto manner. As set forth above, O.C.G.A. ' 9-3-99 became effective July 1, 2005. The wrongful death case which resulted in injuries to our Florida client occurred in October, 2004. Because the tolling statute became law 8 months after the cause of action arose, the trucking company contended that our attempted utilization of the new statute was unconstitutional because the

statute would have to be retroactively applied in order to benefit the Florida resident. However, Georgia law seems clear that when a new statute of limitations comes into being on a cause of action which has not yet expired under previous statutes, the extension of such claim by the new tolling provision does not result in an impermissible ex post facto application of the new law. If our client's cause of action had expired before the new statute came into being, we would have agreed that the ex post facto clause could have been properly considered. Georgia law seems clear, however, that a statutory extension of a statute of limitations can be given a legal effect without violating the ex post facto doctrine provided the cause of action to which it applies has not yet expired before the statute is extended. See Hunter v. Johnson, 259 Ga. 21, 376 S.E. 2d 371 (1989).

Because the provisions of the victims' rights legislation are obviously remedial in purpose, under Georgia law, they must also be broadly construed to accomplish the Legislative purposes intended. See Smith v. Commercial Union Assurance Company, 246 Ga. 50, 51, 268 S. E. 2d 632; Maryland Casualty Company v. Rhoden, 170 Ga. App. 704, 705, 318 S. E. 2d 175 (1984). Procedurally, in cases involving this statute, it may be difficult for a defendant to obtain a successful ruling on a Motion to Dismiss. In any Motion to Dismiss, the plaintiff's pleadings must be construed most strongly in plaintiff's favor and against the contentions of the defendant. See Bakhtiarnejad v. Cox Enterprises, 247 Ga. App. 205, 208, 541 S. E. 2d 33 (2000). If counsel specifically pleads that his or her client is a victim of a criminal act and that under the new statutes' provisions the limitations period has been tolled, then in that event, a Motion to Dismiss is likely to fail provided

counsel also pleads that the prosecution of the alleged crime or act giving rise to such action in tort has not become final or otherwise terminated or became final less than two years prior to filing the lawsuit. Once such pleadings are made, the defendant will then have to file a Motion for Summary Judgment. An issue of fact, however, can be placed into the record with respect to whether the client is a Avictim@ as defined under Georgia law in most cases simply by introducing into evidence the traffic charges and/or other criminal charges filed against the defendant with proof that the criminal prosecution has not yet become final or had become final before two years elapsed prior to filing the lawsuit. This could be accomplished quite simply vis a vis Request for Admissions addressing these subjects and/or through the production of the certified criminal disposition records.

A potentially interesting application of this statute is its possible impact upon ante-litem notices. It is well established that failure to comply with an ante-litem notification provision within the time required by law is a bar to any right of action. See Mattox v. Bailey, 221 Ga. App. 546, 472 S.E. 2d 130 (1996). However, an ante-litem time requirement has been held to be, in itself, a form of statute of limitations, with all general principles applicable to statutes of limitation also applying to ante-litem time restrictions, including tolling provisions. See Howard v. State, 226 Ga. App. 543, 487 S.E. 2d 112 (1997); City of Atlanta v. Barrett, 102 Ga. App. 469, 471, 116 S.E. 2d 654 (1960). This being the case, if a victim/client is late in filing an ante-litem notice with a municipality, county or with the State under the State Tort Claims Act, it would appear that the statute under consideration would also provide relief to such a victim/client based on the language

cited tolling the statute of limitations.

Our firm was recently retained by a gentleman whose wife was killed during a police chase. The wife was an innocent third-party caught up in the chase. This particular client had hired a previous attorney who did not file an ante-litem notice with the County involved within twelve (12) months. However, the fleeing suspect was prosecuted by law enforcement authorities and the prosecution ended only a month ago. Obviously, our position will be that the statute of limitations for the entire cause of action was tolled and thus the ante-litem notice we will be filing on his behalf is still timely. Again, this is another area of the law which will have to be explored as the interpretation of this statute is provided by the Courts.

CONCLUSION

When the Crime Victims Restitution Act of 2005 was enacted, the Legislature stated in its preamble that the purpose of the Act was among other salutary goals Ato substantially revise the laws of this state relating to the conduct of criminal trial and the impact of the criminal justice system on victims of crime; to amend Article V of Chapter 3 of Title IX of the Official Code of Georgia Annotated, relating to tolling of limitations in civil cases, so as to provide for a statute of repose in certain tort actions brought by victims of crimes against the persons accused of such crimes, to amend Title XVII of the Official Code of Georgia Annotated, relating to criminal procedure . . .@ Given that a specific purpose of the new Act was to toll the limitations in civil cases so as to provide for a statute of repose in tort actions brought by victims of crimes, counsel in the future should always be cognizant of

the existence of this relatively unused, untested and very interesting law. Because the language of the statute is so broad, particularly in view of its remedial purposes, we believe it can and will benefit tort claimants in the future where defendants have been charged with crimes arising out their tortious acts.

Richard W. Hendrix, a longtime GTLA Champion, is a partner at Finch McCranie, LLP in Atlanta. He graduated from Davidson College (B.A. cum laude 1974) and earned his law degree from Emory University in 1977. He may be reached at 404-658-9070 or rhendrix@finchmccranie.com .